

STATE OF ALASKA

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August 26, 2004

Mr. Mitch Demientieff, Chair
Federal Subsistence Board
Office of Subsistence Management
3601 C Street, Suite 1030
Anchorage, AK 99503

Dear Mr. Demientieff:

As provided for in Subpart B, 36 CFR § 242.20 (DOA); 50 CFR § 100.20, of the Subsistence Management Regulations for Public Lands in Alaska, the Alaska Department of Fish and Game hereby requests that the Federal Subsistence Board reconsider action taken at its May 2004 meeting to authorize the sale of handicraft items made from the skin and claws of brown and black bears. The attached Request for Reconsideration details the reasons for our opposition to this new federal regulation as adopted.

I urge the federal board to carefully consider this request and act expeditiously. Thank you for your attention to this important issue.

Sincerely,



Kevin C. Duffy
Commissioner

Enclosure

cc: Wayne Regelin, Deputy Commissioner, Alaska Department of Fish and Game

**REQUEST FOR RECONSIDERATION
OF FEDERAL SUBSISTENCE BOARD PROPOSAL WP04-01**

By State of Alaska

August 25, 2004

I. Introduction.

The State of Alaska respectfully requests that the Federal Subsistence Board (Board) reconsider its decision of May 21, 2004 on Proposal WP04-01, adopting the final rules allowing the sale of claws from bears taken for subsistence. Reconsideration is required because in adopting the final rules, "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law." 36 CFR § 242.20(d); 50 CFR § 100.20(d). Allowing the sale of bear claws under current conditions is inconsistent with the Alaska National Interest Lands Conservation Act (ANILCA) because (1) the practice is inconsistent with sound wildlife management principles, (2) because it allows a practice that has not been demonstrated to be customary and traditional, and (3) because it potentially allows "commercial" sales. Because the adopted regulation purports to authorize a customary and traditional activity that was not supported as such on the record, it is arbitrary and capricious. As required by 36 CFR § 242.20(d)(4) and 50 CFR § 100.20(d)(4), a detailed statement follows.

II. Regulations Challenged.

At its meeting in May 2004, the Board considered Proposal WP04-01, which originally would have amended 36 CFR § 242.25(j)(6) and 50 CFR § 100.25(j)(6) as follows:

§ ____ .25(j)(6) You may sell handicraft articles from the fur of a black bear or brown bear.

During its meeting in May 2004, the Board amended the proposal to clarify that the sale of claws, as well as the hide, would be allowed. After first rejecting the proposal on May 20, 2004, on reconsideration, the Board adopted the following language by a 4-2 vote on May 21, 2004 (the newly added language is underlined):

____.25 Subsistence taking of fish, wildlife, and shellfish: general regulations.

(j) Utilization of fish, wildlife, or shellfish.

...

(6) You may sell handicraft articles made from the fur or claws of a black bear.

(7) You may sell handicraft articles made from the fur or claws of a brown bear taken from Units 1-5, 9(A)-(C), 9(E), 12, 17, 20 and 25.

The effect of the regulatory amendments is to permit the sale of handicraft items made from the claws of black bears taken on any federal public lands in Alaska. As for brown bears, handicraft items made from claws of animals taken in management units in Southeast Alaska, the Bristol Bay area, and Eastern Interior Area may be sold. The regulations impose no limits on the amount of money that may be exchanged for the handicraft items. According to a draft Q&A informational sheet prepared by federal staff, the items could not be resold by anyone but Federally qualified rural residents.

III. Discussion: The Regulations Are Inconsistent With ANILCA and Arbitrary.

A. The proposed regulations are inconsistent with "sound management principles, and the conservation of healthy populations of fish and wildlife."

The new claw regulations effectively create a brand new market for bear claws in Alaska that will likely lead to overharvest and waste of bears. There is some evidence that this is already taking place. Recent newspaper reports indicate brown bears being killed, stripped of their claws, and left to waste in the Katmai National Park area. The regulations should be reconsidered and amended to prohibit the sale of handicraft items made from bear claws.

In enunciating its policy in adopting the subsistence priority in ANILCA, Congress was careful to qualify that the subsistence priority would be subject to sound management and conservation principles:

It is hereby declared to be the policy of Congress that –

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, ... consistent with management of fish and wildlife in accordance with recognized scientific principles ... the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so....

16 U.S.C. § 3112(1). Regional Advisory Council (RAC) recommendations on subsistence regulations are to be given a certain amount of deference, but may be

rejected when it is determined that they are "not supported by substantial evidence" or would "violate recognized principles of fish and wildlife conservation." 16 U.S.C. § 3115(c).

As evidenced by the professional federal staff comments, the bear claw sale regulations violate sound management principles. The federal staff noted their opposition to the proposal based management principle concerns in their reports to the RACS:

A regulatory law enforcement framework to control illegal harvest or to control the legal sale of brown bear fur handicraft items is not currently in place nor does it appear to be practical. This proposal generates many legal, biological, and cultural concerns. Should the board adopt this proposal, some rural residents will find this practice culturally objectionable. The sale of handicraft items made from brown bear parts could increase the potential for additional legal and illegal harvest, possibly over-exploiting some populations. The development of a cash economy associated with the sale of wildlife products has often been shown to be detrimental to the species involved. Brown bear populations are usually small in number, have low population growth rates, low sustainable yields, higher commercial value, and are easily over-harvested. Adopting this proposal may result in increased illegal harvests and provide economic incentives that may lead to the wasting of some bear parts such as the meat. Individuals not previously associated with bear hunting could change their behavior and become bear hunters. Commercial trade in brown bear fur handicrafts could lead to an increase in illegal trafficking of endangered populations of brown bear outside of Alaska.

Wildlife Meeting Materials for March 18, 2004 Meeting of the Kodiak/Aleutians RAC at page 26.¹

At the Board meeting on May 20, 2004, the Interagency Staff Committee opposed the proposal as follows:

MR. EASTLAND: Thank you, Mr. Chair. I'm Warren Eastland with the BIA for the Interagency Staff Committee. Our recommendation is to oppose the proposal. The recent action taken by the Alaska Board of Game will provide starting on July the 1st of this year regulatory change that will allow the sale of handicrafts

¹ The references to "fur" in the staff comments include "claws" since "fur" was and is defined to include claws under federal regulations. 36 CFR § ____.

made from brown bear fur, as do existing National Park Service regulations for brown bears that are taken on National Park land.

Failure to adopt the proposed regulations will not deny the requested opportunity to Federal qualified subsistence users who wish to sell handicrafts made from brown bear because State regulations will allow for the sale of handicrafts made from the fur of a brown bear harvested under State regulations.

The Federal threatened status of brown and grizzly bears in the Lower 48 States will require permits for the sale of brown bear parts, such as handicrafts, that would be taken outside of the borders of Alaska, and such a permitting process is not in place. Accordingly, there is no enforcement framework to limit the trade in brown bear handicrafts to those taken solely in Alaska, and permitting such trade without the proper permitting process would be contrary to wildlife conservation principles.

We do recognize that in some locations it is traditional for cultural regalia to be adorned with brown bear fur and claws and for artisans to be paid for the production of such regalia. State regulations will permit such regalia to use both brown bear fur and the claws, although the claws may not be sold, but the claws must be provided by the person for whom the regalia are intended. And there is nothing in either Federal or State regulations that prohibits the transfer of brown bear claws purely as gifts.

And that's the position of the Interagency Staff Committee.
Thank you, sir.

Federal Subsistence Board May 20-21, 2004 Meeting Transcript (FSB Transcript) at 249. Various staff and board members raised serious concerns about the risks involved in authorizing the sale of bear claws. BLM Board Member Taylor Brelsford commented:

MR. BRELSFORD: Mr. Chairman, if I may, on behalf of Henri Bisson, the director for the BLM who was obliged to go to another meeting this afternoon, I'd like to focus on a couple of other issues....

Secondly, I heard the proposition offered that we ought not to be concerned about bear populations, and I really have to say I don't think that's a reasonable position. I believe ANILCA clearly imposes a conservation mandate on the Board and on the Regional Councils,

and that is framed broadly in terms of conserving healthy populations, providing for non-wasteful subsistence uses. So I think the conservation issue does have to be on the table in our eyes.

Thirdly, I heard it suggested that law enforcement is not a legitimate consideration in this. And again I would have to say I think our reasoning process does in fact have to take into account the law enforcement context. In my view, that represents one component of the, quote, recognized principles of fish and wildlife conservation.

So in my mind, the issue before the Board is really a balancing act. There are historic episodes of market driven overharvest through the commercialization of subsistence resources. The market hunting in the Nenana area and the impact, the role that that played in the establishment of Denali National Park would be one example. There are international examples where key subsistence resources were commercialized without meaningful regulatory regimes, and those resources were driven into extirpation in some cases. So I think we ought to put all of the elements on the table and think about the balancing act. We want to provide for the legitimate subsistence uses in regions, and we want to listen and learn from Councils about what those uses are. At the same time, I think we do want to take into account what law enforcement tells us about market pressures and so on.

So at the end of the day, I'm sort of sitting here thinking about are subregional or region specific solutions possible, and are they sound, and I wonder if any of the agencies' law enforcement people are here today to add some light on the question of whether a regulation in three regions, Eastern Interior, Bristol Bay, Southeast, could go forward and be effectively implemented and appropriate protections, conservation protections be implemented with region-specific regulations. So, Gary, I don't know if you've got Staff available that might be able to address the question.

Id. at 261-62. In response to Mr. Brelsford's question, USFWS Board Member Gary Edwards stated:

MR. EDWARDS: Well, we don't have any. We could certainly get them over here quickly, but I do think they would say that that in itself would be problematic, and then if you further complicate that of having it different from the State regulations, which one could keep the claws and one couldn't, that would just

add another significant layer on top of that it would seem to me. And I feel fairly comfortable that that's the answer they would give, but we can certainly have some folks over here probably within a half hour to address the question.

Id. at 262.

Mr. Edwards expressed his own concerns about the pressures that might be put on bear populations by legalizing the sale of claws in addition to hides:

MR. EDWARDS: Mr. Chairman, my concern is that once we make the decision to allow -- also include bear claws, I think as with other parts of wildlife, for example bear gall bladders, we have a significant potential of increasing the harvest, and because of the high monetary value that those are. And I recognize that we have limits, as we do have limits in black bears, but that certainly has not prevented some of the abuses and the cases that have been made of black bears been taken illegal simply for the sale of their gall bladders.

Id. at 268. And the chair of the Seward Peninsula RAC explained the RAC's opposition to the proposal, in part, as follows:

And we also felt that this proposal may result in increased illegal harvest, and could provide economic incentives associated with bear hunting, thus changing the incentive of the bear hunters.

Id. at 216.

During reconsideration deliberations the next day, USFWS Enforcement Officer Stan Prusenski testified about various enforcement and conservation concerns as follows:

The issues have come up about consistency with State law. Enforcement people are always very anxious and very concerned when regulations diverge, and we allow a very specific exemption under either one jurisdiction, one land management unit, that in other areas of the State all other jurisdictions prohibit something. We've talked about one bear every four years I believe. When you see handicrafted items, be it fur items or claw items we don't know when this animal was taken, we don't know where it was taken, we don't know anything about it other than there's an item for sale.

In the Staff Committee's recommendations, they talk about transfer of brown bear claws as gifts. I caution all of you to beware that is true, but in other wildlife items we've seen abuses in that, let's say a claw necklace/pendent, is sold and that the only the chain or the actual items that are fastening the chain to the claw are for sale, and the rest of the item is being gifted. I see a parallel issue here with migratory birds and taxidermy mounted birds. And that the individual buys the wood mount and does not buy the duck, I could see this as being a similar issue.

An issue for all of [us] I believe is potentially conservation issue in that throughout the State of Alaska, we've seen in the last couple of years, a significant increase in the take of bears, both black and brown for g[a]ll bladder trade. This is strictly a black market endeavor. We have seen significant numbers of bears in the woods with only the g[a]lls removed. If now we allow portions of that bear to be legally commercialized, in our view that may increase the incentive and certainly increase the profit per animal. So I would see that as real significant potential problem for us.

Id. at 338-39. In answering a question about the USFWS being in a position to handle the enforcement challenges presented by the new regulations, Mr. Prusenski indicated an inability to do so under present circumstances:

MR. LITTLEFIELD: Follow up, Mr. Chair. Then given that we've had this and we've had these in place for many years, as the law enforcement agency is required to enforce those, you seem to be able to have adapted to those over the years, including the gall bladder. I mean it's a problem perhaps, but you've adapted to take care of it. In other words, that's the same rationale I was using on this. If it increased that opportunity, law enforcement would then have to do whatever was required to make sure that the people weren't breaking the law.

CHAIRMAN DEMIENTIEFF: Go ahead.

MR. PRUSENSKI: Mr. Chair. Are we able to arise to the challenge? I hope so. I currently have 13 special agents in the state and have significantly more responsibilities than what's under these Federal subsistence regulations. This may cause a significant change in our work patterns if we're required to deal with this issue as well. Other handcrafted items not under Federal subsistence

purview, we still have a long way to go in getting that problem or that situation under control.

So, to answer your question or your statement, yes, I would hope to be able to rise to that challenge, but we are not in a position to be able to do that, I believe, at this time.

Id. at 342.

Since the regulations were adopted, there is strong indication that bears have been and will be taken for their claws alone. An August 4, 2004 article in the Anchorage Daily News reported that front claws had been cut from at least two brown bear carcasses that had been left to rot along the northern border of the Katmai National Park and Preserve. Attachment 1 at 1. Katmai Superintendent Joe Fowler indicated that there had no attempt to harvest other body parts of the bears. *Id.* The article addressed the issue of the sale of bear parts:

Illegal trafficking of bear body parts, especially black bear gall bladders and paws, has been increasing in recent years due to high prices paid by Asian and Internet dealers. It's against state law to sell brown bear parts.

But under new federal regulations for brown bears legally killed in certain subsistence hunts, people can resell grizzly hides and claws as part of handicrafts, said biologist Dan Laplant, with the Office of Subsistence Management in Anchorage.

An Internet search a few months ago turned up brown bear claws selling for \$30 to \$300, Laplant said. "I just wondered if there was a market for them."

Id.

Although the take of brown bears for subsistence is very legitimate, because of the monetary value involved with bear claws, these regulations will provide a substantial incentive to take bears primarily for the purpose of commercial gain. The fact that the commercial value of brown bear claws is significantly higher compared to other wildlife parts makes it much more likely that conservation of brown bears would be compromised. Given the enforcement and conservation concerns surrounding the sale of bear claws, it is clear that the terms of the regulations that allow such sales are not consistent with sound management principles or the conservation of healthy populations of brown and black bears. The Board should reconsider and repeal the application of the

regulations to the sale of claws, especially in light of the fact that such sales have not been shown to be customary and traditional.

B. The proposed regulations are inconsistent with ANILCA because they authorize transactions that are not customary or traditional.

Reconsideration is required because, in adopting the bear claw regulations, the Board did not adhere to provisions of Section 803 of ANILCA, which authorizes only subsistence uses that are customary and traditional. The Board did not have substantial evidence before it that the sale, as opposed to the barter, sharing or use, of bear claws in handicraft items, was customary and traditional or a customary trade practice.

"[R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States v. Larionoff*, 431 U.S. 864, 873, 97 S.Ct. 2150, 2156 (1977).² ANILCA authorizes only subsistence uses that are "customary and traditional." Section 803 of ANILCA defines "subsistence uses" as follows:

As used in this act, the term "subsistence uses" means *the customary and traditional uses* by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for *customary trade*.

16 U.S.C. § 3113 (emphasis added). To be a valid subsistence use under this section, then, any selling allowed must be "customary and traditional uses by rural Alaska residents of wild [bear].... for the making and selling of handicraft articles out of nonedible byproducts of ... wildlife resources taken for personal or family consumption ... [or] for customary trade." *Id.* Every use listed is modified by the prefatory phrase "customary and traditional." The Board's past interpretation that authorized uses need not be customary and traditional is not rational or grammatically logical. In addition, this statute should also be narrowly construed because it constitutes a federal encroachment on a basic aspect of state

² "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is ... [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Id.* at n.12 (citations omitted).

sovereignty, a state's authority over management of fish and game within its borders.³

Federal courts have already acknowledged that ANILCA only authorizes "customary and traditional" subsistence uses on federal public lands in Alaska. As noted by the 9th Circuit Court of Appeals in addressing the scope of customary trade authorized by ANILCA, to be a valid subsistence use under ANILCA customary trade:

1. must be "customary and traditional;"
2. "must be conducted in a manner consistent with a subsistence lifestyle; ANILCA does not permit the establishment of significant commercial enterprises under the guise of subsistence uses;" and
3. "the size of the transaction or the manner in which it is conducted may place it outside the bounds of customary trade."

United States v. Alexander, 938 F.2d 942, 948 (9th Cir. 1991). Under ANILCA and this judicial interpretation, only uses and transactions that are customary and traditional, consistent with a subsistence lifestyle, and within the bounds of customary levels are authorized by ANILCA.

There is nothing in the record of the Board to show that the sales allowed by the final rules are consistent with customary practice because there was insufficient evidence of what the customary practices have been. The record before the Board at its May 2004 meeting did not establish whether or not the selling of handicraft items made with bear claws was a customary and traditional subsistence use in various parts of Alaska. There were no surveys or other competent data to show whether bear claw items were traditionally sold. Given those deficiencies, it is obvious that nothing in the administrative record supported the proposition that the unlimited level of sales allowed under the final rules is within customary and traditional bounds.

The inclusion of bear claws, as distinguished from bear fur, in the new regulation appears to have been largely by accident and oversight. As federal staff pointed out, the original intent of the Board in 2002 in adopting the original version of the regulation in 2002 was to have matched the regulations of the state Board of Game dealing with the sale of handicraft items made from black bear fur.

³ "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Accordingly, courts will not construe a statute to alter the federal balance unless that result is unmistakably clear in the language of the statute. *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 768, 120 S.Ct. 1858, 1870 (2000). ANILCA's subsistence provisions involve the balance of federal power because management of fish and wildlife within its borders is "peculiarly within [a State's] police powers." *Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 391 (1978).

FSB Transcript at 211. The Board, at that time, failed to recognize that the federal definition of fur, unlike the state definition, included claws. *Id.* The 2002 Board deliberations did not even discuss the sale of black bear claws, much less whether such sales were customary and traditional. Until the conclusion of the May 2004 meeting, staff intended to correct the oversight with a regulatory change so the federal definition of fur would not include claws. Instead, without any substantive discussion or analysis, the Board decided to keep claws in the new regulatory authorization.

There is no foundation in the Board's record to support the conclusion that the sale of handicraft items made from black and brown bear claws was customary and traditional. The 2004 Proposal, WP04-01 did not expressly refer to claws at all. It was also intended to match a recent state Board of Game action to authorize the sale of handicraft items made from brown bear fur, which did not include claws under the state definition. FSB Transcript at 210-11.

Review and discussion of the proposal by the Regional Advisory Councils did not establish the customary and traditional nature of sales of handicrafts made from black or brown bear claws. In the Seward Peninsula RAC meeting, claws from black or brown bears were not discussed. Seward Peninsula RAC Transcript at 16-28 (February 19, 2004). Claws were not even mentioned during the Northwest Arctic RAC meeting. Northwest Arctic RAC Transcript at 34-39 (February 25, 2004).

During the Bristol Bay RAC meeting, the Aniakchak Subsistence Resource Commission stated in written comments that "brown bear fur is not used by area crafts people for traditional handicrafts," but the RAC, nevertheless, favored allowing the use of brown bear hides and claws by those without cultural sensitivities, although there was no discussion of examples of past use of claws in handicrafts. Bristol Bay RAC Transcript at 17-37 (February 26, 2004). During the Easter Interior RAC meeting, although RAC members expressed support for the proposal, and a member of the public expressed a desire to make and sell bear claws necklaces, there was no documentation or claims of customary and traditional use of bear claws, black or brown being sold as handicraft items. Eastern Interior RAC Transcript at 18-50 (February 27, 2004). In the Yukon-Kuskokwim Delta RAC meeting there was no reference at all to using brown bear claws in the making of handicraft items. Y-K Delta RAC Transcript at 43-54 (March 3, 2004). During the North Slope RAC meeting, references were made to using brown bear fur and claws for making handicraft items, but sale of such items was not discussed. North Slope RAC Transcript at 36-50 (March 4, 2004).

In the Southcentral RAC's discussion of the proposal, it was established that Ahnna people did not sell bear parts and that hides were used by Ahnna people

for handicrafts and claws were used as ceremonial items, but there was no documentation or claims that claws were customarily and traditionally sold as handicraft items. Southcentral RAC Transcript at 12-67 (March 10, 2004). In the Western Interior RAC meeting, some members were concerned that the high demand for bear claws could promote unsustainable harvest of brown bears and similar values of claws and gall bladders were noted; there was no documentation or claims of customary and traditional bear claw sales. Western Interior RAC Transcript at 174-196 (March 10, 2004).

While a majority of Southeast RAC members supported the proposal, including the sale of claws used to make ceremonial regalia, there was no specific reference to the sale of handicrafts from brown bear fur and claws being a customary and traditional activity. One elder said that brown bear ears were used for making regalia, with the person ordering the item paying an artist to make it, but there was no specific reference to claws. Southeast RAC Transcript at 69-107 (March 17, 2004).

The Kodiak-Aleutians RAC noted that even displays of brown bear hides was considered disrespectful in the Aleut culture. The RAC did not support the proposal, in part because of a lack of information that selling handicrafts made from brown bear fur and claws constituted a customary and traditional activity. Kodiak-Aleutians RAC Transcript at 13-22 (March 19, 2004).

At the Board's May 20-21, 2004 meeting, the record did not establish that the selling of handicraft items made from black and brown bear claws was a customary and traditional activity. The Board adopted a regulation allowing the sale of black bear claw handicrafts statewide without any real explanation or analysis, and in spite of the fact that the staff demonstrated that the 2002 version of the regulation that mistakenly purported to authorize such sales was in error.

As for brown bear claw handicraft items, the Board authorized selling items made from brown bears taken in the only in those regions where the RAC supported the action: Southeast, Bristol Bay, and Eastern Interior. The following is the extent of evidence that claw handicraft sales were customary and traditional.

1. For the Southeast, RAC chair John Littlefield reported:

While there was some concern for commercializing brown bear parts taken for subsistence, the Council wanted to ensure that traditional regalia could be repaired, remade or created from bear parts. The Council heard from former Council member Herman Kitka, Sr. Mr. Kitka described the construction and use of brown bear regalia, including the use of brown bear ears and claws. Ears have been used

in traditional dancing headgear, and the claws are used for dancing necklaces. Old items are in need of repair, and there's a limited need for fabrication of new dance related regalia. Mr. Kitka noted that artists who make such items are traditionally paid for their work.

FSB Meeting Transcript at 214. Mr. Littlefield's statement does not constitute evidence of the sale of claw handicrafts, but rather payment for a service which is legal under both state and federal law.

2. For the Eastern Interior, chair Fleener reported that people in his area have a "long history of using parts of brown bear for handicraft items," but did not offer any evidence of an historical practice of selling such items or refer to the sale of claws specifically. *Id.* at 220.

3. For the Bristol Bay RAC, chair Dan O'Hara offered no evidence for the customary and traditional nature of the sale of bear claw handicraft items. *Id.* at 248.

BLM Representative Brelsford raised the issue of the customary and traditional nature of the uses authorized by the proposed regulations at the beginning of Board deliberations:

MR. BRELSFORD: Mr. Chairman, if I may, on behalf of Henri Bisson, the director for the BLM who was obliged to go to another meeting this afternoon, I'd like to focus on a couple of other issues. I think we've spoke about a couple of regions' specific practices, but I guess I'd like to say that I do believe the cultural objections of certain regions are relevant. I believe the charge of the Federal Subsistence Board is to provide for the subsistence practices, and where those practices are culturally unique in particular regions, I believe it serves us all to take those into account. So I believe where Councils have said, this does not constitute a subsistence practice in our view, I believe that ought to be a weighty proposition for us.

Id. at 261.

USFWS Board Member Gary Edwards, in a long exchange with several board members and RAC chairs, attempted without success to elicit some evidence of customary and traditional selling:

MR. EDWARDS: I don't know, it seems to me that there is some confusion as to what you can and can't currently now do. I

notice in looking at the Southeast's comments, they express concerns about being able to refurbish or fabricate ceremonial items that were used, and expressed some concerns about could you pay an artist to take bear claws, for example, and make a ceremonial necklace out of them. And the answer to my understand[ing] is currently you can do that. It would be no different than if I shot a duck and wanted to have a taxidermist mount it, I can certainly pay for that. So there's no prohibition. Currently this can be done. So I don't see a whole lot of, you know, comments were the concerns they can't currently even be addressed with or without the State's law, because the law allows you to use for personal use as well as barter or give of parts of wildlife now taken under subsistence.

It seems to me that that's really what's facing us is maybe the more fundamental question, was there a traditional use of making handicraft out of bear parts and then selling them, and I haven't heard one word today which indicated that there has been such historical use, and isn't that kind of the fundamental question that we should be addressing?

CHAIRMAN DEMIENTIEFF: John.

MR. LITTLEFIELD: Mr. Chair, I'd like to respond to that for the Southeast Regional Advisory Council. As Mr. Kitka, who is what they call a big man in his particular clan, stated, it is the tradition of the Tlingit people to have someone of the opposite moiety make something for you and then you would pay them for that. You don't have your own clansman make that for you. And it's completely — that's the way it was in the past, that's the way it is today. You commission someone of the opposite moiety to make something for you, not necessarily bear claws, but any piece of regalia, and then you compensate those people for that. It's a paid position. So that's ongoing and it also has been past practice.

MR. EDWARDS: My only comment was, is that you can currently do that now without this regulation or without the State regulation. There's nothing to prohibit that. Unless I'm wrong. Because the law is very clear that subsistence parts can be made into handicraft, and they can be bartered, they can be used for personal use, and they can be given as gifts.

MR. LITTLEFIELD: As I mentioned earlier, I don't feel that we have to mirror State regs. This is talking about Federal bear in

which there may or may not be differing regulations, and we want to utilize that whole bear. So there are differing. And if they happen to match, that's good.

MR. EDWARDS: My point is I think ANILCA clearly provides the use of handicraft that can be bartered, traded or used for personal use. So currently ANILCA allows the example that you provided.

....

MR. EDWARDS: But isn't there still an issue with regards to the historical sale of handicraft made from brown bear parts? And again, I didn't hear anything today which indicated there is historical evidence that brown bear parts were sold as handicraft.

Id. at 255-59.

The bear claw handicraft regulations are inconsistent with ANILCA because they authorize uses that were not customary and traditional. The Board should reconsider and amend the regulations to at least make them inapplicable to handicraft items made from bear claws. A failure to do so will likely create an environment for significant commercial enterprises involving bear claws.

C. The Regulations Allow Commercial Use of Bear Claws.

ANILCA does not authorize subsistence uses that are significant commercial enterprises. *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). The final rules generally authorize transactions of any size, with no limits on the dollar values involved. This permits an enterprise that is potentially a significant commercial enterprise. Based on Mr. LaPlant's market research that indicated bear claws selling for as much as \$300, the current regulations help create a commercial market for bear claws that will likely have an impact on bear populations beyond the legitimate subsistence harvest. Because of the incentives created by this regulation, it is likely that, in addition to increased levels of legitimate subsistence hunting, bag limits and reporting violations will increase significantly, creating an entirely "commercial" market.

D. The Regulations Are Arbitrary and Capricious.

Second, regulations, in order to be valid, must be reasonable, and not arbitrary or capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 822 (U.S. 1971). The object of the final rules is

purportedly to provide for customary and traditional subsistence uses, but the record does not demonstrate that the transactions allowed are customary or traditional. This logical defect renders the final rules arbitrary and capricious. Accordingly, the Board should reconsider its decision to implement these invalid regulations.

IV. Conclusion.

The bear claw regulations are not based on sound management principles. They ignore the management and enforcement concerns of the state and interagency staff. They authorize uses that are not customary and traditional, and that have the potential to develop into significant commercial enterprises. They are arbitrary and capricious. For these reasons, the State of Alaska respectfully requests that the Federal Subsistence Board reconsider its final rules authorizing the sale handicraft items made from black and brown bear claws.

STATE OF ALASKA
DEPARTMENT OF FISH AND GAME

DATED: August 26, 2004

Kevin C. Duffy
KEVIN C. DUFFY, COMMISSIONER